United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

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76-1015

To be argued by
SHEILA GINSBERG

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

-against-

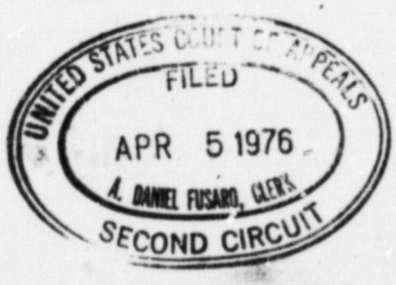
ADOLPH RIVERA,

Defendant-Appellee.

Docket No. 76-1015

BRIEF FOR APPELLEE RIVERA

ON APPEAL BY THE GOVERNMENT
FROM AN ORDER OF THE
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK



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Preliminary Statement

This appeal by the Government is from an order of the United States District Court for the Southern District of New York (The Honorable Constance Baker Motley) entered on December 12, 1975, granting, after a hearing, a motion to suppress a statement as the product of an unlawful arrest.

Appellee Adolph Rivera was indicted[1] along with Marc Fisher, Kenneth Myerson, and Frederic Glenn, for conspiracy to distribute and possess lysergic acid disthylamide (LSD), in violation of 21 U.S.C. §§812, 841(a)(1), and 841(b)(1)(B) (Count One), and for three substantive counts of distribution and possession of LSD, in violation of 21 U.S.C. §§812, 841(a)(1), and 841(b)(1)(B) (Counts Three, Four, and Five).[2]

The Legal Aid Society, Federal Defender Services Unit, continues as counsel on appeal pursuant to the Criminal Justice Act.

Statement of Facts

After the filing of the indictment, Rivera made pretrial suppression motions. He challenged the admissibility of a statement he had made to the Assistant U.S. Attorney on the ground that it was obtained as a result of a denial of his right to counsel, was the product of undue delay in his arraignment, and was obtained as a result of his unlawful arrest. Hearings were held on September 13, 1974, and December

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[1] The indictment is made part of the Government's appendix at A5-A10; the trial has been stayed pending appeal.

[2] Frederic Glenn pleaded guilty to two counts and was sentenced to a two-year probationary term; Kenneth Myerson and Marc Fisher both pleaded guilty to one count, and each was sentenced to a three-year term of probation.

12, 1975. Judge Motley found that Rivera's claimed denial of the right to counsel was unsupported by the record. She did not then, and has not to date, ruled on the claim that there had been undue delay in arraignment[3] (Tr. 97-97a[4]). On December 12, 1975, she suppressed the statement, finding that it was a fruit of an arrest made without probable cause. It is from this order that the Government appeals.

A. The December 12, 1975, Probable Cause Hearing

Agent O'Connor testified that early in the evening of April 16, 1974, Drug Enforcement Administration (DEA) agents arrested Marc Fisher and Kenneth Myerson for selling LSD (3[5]). Myerson agreed to cooperate by revealing the identity of his supplier and arranging for the DEA agents to meet him (4). Toward that end Myerson called Frederic Glenn and arranged a meeting between Glenn and Agent O'Connor for later that night at Manjo's Restaurant (4).

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[3] At the close of the September 13 hearing, after denying relief on the deprivation of counsel issue, Judge Motley directed that counsel submit a brief on the "undue delay" issue. That brief was submitted prior to the filing of the motion challenging the existence of probable cause to arrest, and has been docketed as part of the record on appeal. The motion is still sub judice in the District Court.

[4] Numerals in parentheses preceded by "Tr." refer to pages of the transcript of the first hearing, dated September 13, 1974.

[5] Numerals in parentheses refer to pages of the transcript of the December 12, 1975, hearing on the issue of probable cause.

Prior to the meeting, Agent O'Connor, by his own testimony, understood from Myerson that the chain of distribution for the LSD was from Glenn to Myerson to Fisher (4-6). At the restaurant, Agent O'Connor and Myerson sat opposite one another at a table to wait for Glenn (7). At approximately 11:30 p.m., Glenn arrived, accompanied by Rivera (8). Agent O'Connor testified that, upon seeing Glenn and Rivera, Myerson said, "They are here" (16). This testimony was a retraction of O'Connor's earlier assertion that Myerson had said "my people" are here (8).

When Glenn and Rivera approached the table, they were introduced to O'Connor as "Fred" and "Richie"[6] (17). Glenn sat next to Myerson and Rivera next to the agent (8).

Glenn asked Myerson for the money Myerson owed for the earlier delivery of LSD (9). Agent O'Connor responded that he had the money but preferred to keep it and pay for the total amount of LSD after Glenn delivered the additional supply (9-10). Glenn responded that he did not want to deal in the restaurant because it was too public, and suggested that the sale take place in his apartment. Agent O'Connor unequivocally rejected that idea (10).

Negotiation between Agent O'Connor and Glenn inspired O'Connor's suggestion that he count out the $1,800 owed for the first transaction so that Rivera could observe him and,

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[6]Rivera's nickname is "Richie" (Tr. 60).

upon verification that the amount was correct, Agent O'Connor would pass the money under the table to Glenn. Once Glenn had been paid to his satisfaction for the first transaction, he would then pass the additional quantity of the drug under the table to Agent O'Connor. If Agent O'Connor was satisfied, he would pay for the second installment in the same fashion as he proposed to pay for the first (10).

As to Rivera's involvement in this proposal, the following inquiry occurred:

> [ASSISTANT U.S. ATTORNEY]: Did Mr. Rivera by words or action indicate that he understood and agreed to this proposal?
>
> [DEFENSE COUNSEL]: Objection. It is a leading question. I think he should ask him just what Mr. Rivera did.
>
> THE COURT: Yes. What was said, what did he do?
>
> [AGENT O'CONNOR]: At the time when I asked all the participants if they agreed to it I turned to Mr. Rivera and he nodded his head in agreement.

(10-11).

O'Connor then described how he counted the money, holding it beneath the table between himself and Rivera (11). Agent O'Connor did not say that Rivera counted the money; according to O'Connor, Rivera only watched the counting. When Agent O'Connor completed the tally, he passed the money to Glenn. Rivera neither said nor did anything during this process (11-12). Once Glenn had the money in hand, he passed a white envelope containing the drugs to Agent O'Connor (12).

Upon receiving the envelope, Agent O'Connor gave a prearranged signal, and other agents descended to arrest Glenn and Rivera (12). O'Connor conceded that he had previously agreed with his brother officers that they would arrest everybody who had come in and was sitting at that table when O'Connor gave the signal (19).

During the course of argument on the motion, the prosecutor conceded that the reason Myerson had failed, prior to his arrival at the restaurant, to apprise the agents of the existence of Rivera was that

> ... he didn't know Rivera was Glenn's partner, Your Honor.
>
> (50).

B. Prior Proceeding: The September 13, 1974, Hearing

Rivera and his roommate, Frederic Glenn, were arrested at approximately 11:40 p.m. on April 15, 1974 (Tr. 5). They were both handcuffed and taken outside to the street, where DEA Agent Salvemini read Rivera his Fifth Amendment rights from Government Form NNDD-13 which, according to Agent Salvemini, provided:

> ... I told him he had the right to remain silent and I asked him if he understood that and he said yes.
>
> I told him that anything he said could be used against him in court or in any other proceeding and I asked him if he understood

that and he said yes.

I told him he had the right to talk to an attorney before I asked him any questions and to have him with him during any questioning and I asked him whether he understood that and he replied yes.

I told him if he couldn't afford an attorney, the attorney would be provided by the United States Magistrate the following day and I ask[ed] him if he understood that and he said yes.

I told him if he decided to answer any questions we might ask him now without an attorney, that he would be able to stop the questioning at any time in order to consult with an attorney. I asked him if he understood that and he said yes.

(Tr. 7). Emphasis added.

Rivera was then transported to the DEA headquarters on 57th Street in Manhattan, where he was subjected to a strip search (Tr. 9), then photographed and fingerprinted (Tr. 13). During this post-arrest procedure, Rivera, according to his uncontradicted testimony, was ridiculed and intimidated by Agent Salemini because Salvemini had learned that Rivera was in a homosexual relationship with Fred Glenn.

[DEFENSE COUNSEL]: What did Mr. Salvemini say to you?

[RIVERA]: I don't want to get --

[DEFENSE COUNSEL]: Tell us exactly what Agent Salvemini told you.

[RIVERA]: He came in and Fred Glenn was in the next room and he said is it true what Fred Glenn had told him about our relationship and our activities, physical, sexual in the street language.

[DEFENSE COUNSEL]: Just repeat for the Court what the language was, exactly what Mr. Salvemini told you.

[RIVERA]: He came in and said that was it true what Glenn told him about him fucking me in the ass and he had a gun around his waist and he was sort of, you know, not waving it around with his hand, but just making its presence known and he was shouting at me and he was laughing at me, trying to make me feel foolish and also when I was taken out of that room into the fingerprinting room, he was sort of making me a joke to everyone who was there, trying to make me feel like I was a silly little kid or something like that.

[DEFENSE COUNSEL]: Mr. Rivera, are you a homosexual?

[RIVERA]: Yes.

[DEFENSE COUNSEL]: Did you live in a homosexual relationship with Mr. Glenn?

[RIVERA]: Yes, I do.

[DEFENSE COUNSEL]: Was Mr. Salvemini alluding to this relationship?

[RIVERA]: Yes, he was.

(Tr. 74-75).

Later, when Rivera was questioned by other DEA agents concerning his involvement with the LSD sale, he responded, according to the Government's own evidence:

[AGENT BELL]: ... [H]e indicated that he didn't know anything about it [the case] and that maybe he shouldn't say anything else.

* * *

[ASSISTANT U.S. ATTORNEY]: He did say, did he not, words to the effect of, maybe

he shouldn't answer more questions without a lawyer?

[AGENT BELL]: Until he talked to a lawyer.

(Tr. 17).

The interview thus terminated, Rivera spent more than two hours (from some time before 1:00 a.m. to approximately 3:15 a.m.) in transit while the agents attempted to find a place to lodge him for the night. First, he was taken to the Federal detention facility at West Street, but because it was full, he was then transported to the Manhattan House of Detention (The Tombs) (Tr. 19-20). There, after being kept half an hour in a holding cell, he was denied admission because the agents had failed to obtain proper authorization (Tr. 20, 25). At 3:15 a.m. he was returned to West Street where he was kept for the rest of the night in an "intermediate" cell located between the exit and the wardrobe room (67). The cell did not have a bed, and was furnished with only a narrow bench, on which Rivera attempted to sleep. By his estimate, he slept approximately fifteen minutes that night (67).

The following morning Rivera was transported to the United States Court House, arriving at approximately 10:30 a.m. Instead of being taken to the magistrate, he was held for several hours awaiting further questioning in the U.S. Attorney's office (Tr. 26). There, despite Rivera's earlier indication that he wished to talk to a lawyer before answer-

ing any questions, DEA Agent Bell, by his own testimony, admitted counseling Rivera to cooperate now wi the authorities (Tr. 27).

At approximately 12:30 p.m., Rivera was permitted to make one telephone call to a friend, in the presence of Agent O'Connor (Tr. 40). Believing that he would not be released, and in an attempt to explain his expected absence from work for at least several days, Rivera asked this friend to call Rivera's boss and say that Rivera had suddenly been called to Puerto Rico (Tr. 32, 69). He also asked this friend to see about getting him a lawyer (Tr. 69).

At 1:10 p.m. -- more than thirteen hours after his arrest, and with virtually no sleep during that period -- Mr. Rivera was interviewed by an Assistant U.S. Attorney[7] (Tr. 53). After hearing another recitation of his rights, Rivera made the statement now at issue. Never before arrested and therefore unfamiliar with arrest procedure, Rivera explained that he finally agreed to talk because he was convinced that his continued refusal would ensure his continued incarceration, a prospect he found particularly frightening (Tr. 71).

Finally, at 3:30 p.m., Rivera appeared before the U.S. Magistrate, counsel was assigned to represent him (Tr. 60),

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[7] According to the Government, Rivera was the last of the four persons arrested to be interviewed (Tr. 53).

and he was released from custody on a $1,000 personal recognizance bond.[8]

At the close of the hearing, Judge Motley found that Mr. Rivera had not been denied his right to counsel. Decision was reserved on the issue of undue delay in arraignment and the issue is still sub judice (Tr. 97-97a).

C. The Oral Opinion of the District Court Suppressing the Statement

In an oral pronouncement[9] at the close of the hearing, Judge Motley found that there had been no probable cause to arrest Rivera, and therefore suppressed the statement he made to the Assistant U.S. Attorney as the fruit of the primary illegality:

> It just doesn't seem to me to make any sense to have Mr. Rivera watch the counting of the money which was done in a restaurant. What was the point of that? All he had to do was hand it to Glenn under the table and have Mr. Glenn count it to satisfy himself that he had $1800 and then pass the second installment. There wasn't any reason in the world to involve the defendant Rivera, as the defendant Rivera claims. His claim is he was just brought into this by the

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[8] En route to the Magistrate, Agent Greenan gave Rivera Greenan's telephone number and instructed Rivera to call him and report regularly (Tr. 59, 71). At 2:00 a.m. the following morning, Agent O'Connor arrived uninvited at the Rivera-Glenn apartment (Tr. 46).

[9] No written opinion has been filed.

agent, and we are examining his claim to see whether there is anything to that, aren't we?

(56).

In response to the prosecutor's contention that the deal would not have occurred but for Rivera's participation by silence, Judge Motley stated:

> That's a supposition or speculation on our part. There is no evidence to support that.

(58).

In conclusion, Judge Motley summarized the facts as she found them, as follows:

> The question is whether Mr. O'Connor had probable cause to arrest the defendant Rivera, and as I see it, he had no basis for concluding that Mr. Rivera was a partner or had constructive possession of the LSD when he sat down at the table with Glenn. He then suggested, according to his testimony, that Rivera watch the counting of some money. He doesn't tell us that Rivera said anything, he simply nodded, and then, when the money was counted, he doesn't tell us that Rivera nodded to Glenn. So that I don't think he had any probable cause to believe that Rivera had constructive possession of that merchandise.
>
> * * *
>
> [O'Connor] has already testified. He didn't testify that Rivera nodded or said anything after the money was counted, and it is the defendant's claim that this was something made up by O'Connor to involve Rivera, and it seems to me that is what happened here. O'Connor didn't have any probable cause to believe that Rivera had constructive possession of that merchandise when he came into the restaurant. Myerson certainly hadn't mentioned it. Myerson called Glenn. Glenn had the package in his possession. From all that appears, Rivera

just happened to be along. Glenn did not intend to have any transaction in the restaurant, as O'Connor himself testified. Glenn said he wouldn't have any transaction in the restaurant. He, Glenn, was conducting this. And it was O'Connor who brought Rivera into it, and there is no basis for, even on his testimony, concluding that Rivera even agreed, because he doesn't tell us that Rivera said anything or did anything. He said he watched him count some money as he held it to his side and then he passed the money under the table to Glenn first, which he certainly could have done in the first instance and said "Here, count it, and then give the second package," because if the package had come first then his story would have a little more validity, but he passed the money first, which renders his statement that Rivera had to watch the counting not believable.

The motion is granted.

(58-60).

ARGUMENT

THE DISTRICT COURT'S DECISION TO SUPPRESS RIVERA'S STATEMENT AS A FRUIT OF AN ARREST MADE WITHOUT PROBABLE CAUSE WAS CORRECT AND MUST BE SUSTAINED.

A. There was no probable cause for arrest.

At the close of the December 12, 1975, hearing, the District Court, in an oral opinion, found that Rivera's arrest was illegal because it had not been based on probable cause.

The probable cause requirement of the United States Constitution, Amendment IV, ensures that Government officers can not lawfully arrest a person upon "common rumor or report, or suspicion, or even strong reason to suspect." Henry v. United States, 361 U.S. 98, 101 (1959); see also 18 U.S.C. §3052. Probable cause demands no less than that "facts and circumstances known to the officer warrant a prudent man in believing that an offnse has been committed" and that the suspect committed it. Henry v. United States, supra, 361 U.S. at 102; see also Beck v. Ohio, 379 U.S. 89, 91 (1969); Stacey v. Emery, 97 U.S. 642, 645 (1878); United States v. Tramontana, 460 F.2d 464, 467 (2d Cir. 1972); United States v. Gonzalez, 362 F.Supp. 415, 420 (S.D.N.Y. 1973) (Bauman, J.).

Determination of what specifically constitutes probable cause "is preeminently the sort of question which can only be decided in the concrete factual context of the individual case."

Sibron v. New York, 392 U.S. 40, 59 (1968). In this case, the District Court found specifically that at the time of arrest the agents knew no more than that Rivera had accompanied his friend, Fred Glenn, to a restaurant where Glenn was to make the drug transfer. At the time Rivera sat down at the table, Agent O'Connor

> ... had no basis for concluding that [Rivera] was a partner or had constructive possession of the LSD ...
>
> (59),

and when the transfer of the drug was completed,

> ... there was no basis for, even on [Agent O'Connor's] testimony, concluding that Rivera agreed [to participate].
>
> (60).

The Government seeks reversal of the District Court's order by arguing that a finding of probable cause was barred by the fact that (1) Rivera was unnecessary to the successful drug transfer and that (2) Rivera was entrapped by the agents. This analysis is an obvious misinterpretation of the opinion of the District Court.

A fair reading of the record below establishes that Judge Motley's references to "the absence of necessity for appellee's participation" as well as to "Agent O'Connor's manufacture of a role for the appellee" were articulated, not as per se barriers to the establishment of probable cause, but rather to describe the context in which the Judge would interpret and evaluate the significance of a single nod of

Rivera's head. This "nod" of the head when Agent O'Connor suggested that Rivera watch the money being counted was the only semblance of proof upon which the Government could rely to establish Rivera's participation. All the facts which occurred before the "nod" were, taken together, wholly inadequate to meet the Government's probable cause burden.[10]

1. Evidence Before the "Nod"

When Fred Glenn and Rivera entered Manjo's Restaurant, the only information the agents could glean from this appearance was that Rivera was in the company of a person whom the agents believed to be a drug dealer. Beyond doubt, proof that a person accompanies a known narcotics dealer is insufficient to establish probable cause for arrest. Sibron v. New York, supra, 395 U.S. at 62; United States v. Gonzalez, supra, 362 F.Supp. at 420. At the time of Rivera's entrance into the restaurant, the agents had absolutely no other information about him. In fact, what they then knew about the

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[10] Participation in the sale required evidence that Rivera was either a co-conspirator, an aider and abettor, or in constructive possession of the drugs. It is now axiomatic that some affirmative action on the part of the accused is essential for establishing both conspiracy (United States v. Terrell, 474 F.2d 872, 875 (2d Cir. 1973); United States v. Euphemia, 261 F.2d 441, 442 (2d Cir. 1958)) and aiding and abetting (United States v. Peoni, 100 F.2d 401, 402 (2d Cir. 1938)). Constructive possession requires proof of dominion and control. United States v. Febre, 425 F.2d 107, 111 (2d Cir. 1970).

source of the LSD indicated that Rivera was not involved in the drug deal.

For example, the Government informant, Kenneth Myerson, had already identified his supplier as Fred Glenn. When the informant telephoned to arrange the meeting at Manjo's, he placed the call to Glenn alone. While Myerson clearly knew of Rivera -- Myerson introduced him to the agents by his nickname -- he had nonetheless never mentioned Rivera to the DEA agents. The logical explanation for the omission of any earlier reference to Rivera -- the explanation offered by the prosecutor and accepted by Judge Motley -- was that Myerson had no knowledge of Rivera's involvement, and thus had conveyed no information about Rivera to the agents. Since Myerson had no information about Rivera's involvement, it was meaningless that Myerson used either the words "my people" or "here they are" when Glenn and Rivera appeared at the restaurant, and Judge Motley was correct in disregarding that fact.

Moreover, the fact is that Agent O'Connor retracted the assertion that Myerson actually said "my people," and Judge Motley's conclusion that Rivera did not participate in the deal impliedly rejects the assertion that Myerson said it in favor of accepting that Myerson's utterance consisted of the innocuous words, "here they come."

That Rivera remained with Glenn and was present while the latter engaged in a drug discussion with Agent O'Connor

still failed to provide the agents with probable cause to arrest Rivera. It was Glenn, and only Glenn, who demanded payment for the prior LSD sale; it was Glenn who discussed the future transfer; and it was Glenn who possessed the LSD. All that existed regarding Rivera was knowing presence at the scene of a crime, and that does not amount to probable cause to believe there is participation in the crime itself. United States v. DiRe, 159 F.2d 818 (2d Cir. 1947), affirmed, 332 U.S. 581 (1948).

That is particularly true when, as here, evidence established that it was not anticipated that the drug transfer was to occur at this time and place. Glenn stated that Manjo's was too public and that he did not want to make the transfer there. It follows that Rivera's presence with Glenn in the restaurant did not even indicate an intention on the part of Rivera to participate in the deal.

2. The "Nod"

Agent O'Connor refused to leave the restaurant to complete the transaction. Instead, he suggested that Rivera, who was sitting next to him, verify the clandestine counting of $1,800 before O'Connor passed the money to Glenn. According to the proposal Glenn, if satisfied, would pass the next installment of LSD to O'Connor. At the hearing, Agent O'Connor testified that when he looked to Rivera for a reaction

to the suggestion, the latter "nodded in agreement."

Critically, Rivera did nothing more. While O'Connor did assert that Rivera "watched" as O'Connor counted, he neither said nor did anything during or after the count. Therefore, it was impossible for O'Connor to say that Rivera actually counted the money. When O'Connor passed the money to Glenn, the latter transferred the LSD to O'Connor.

On these facts, the interpretation of the meaning of Rivera's "nod" is critical to the issue of probable cause. The Government would argue that Judge Motley's opinion means that entrapment and the irrelevance of Rivera's conduct to the commission of the crime were per se bars to a finding of probable cause. This misinterpretation of the opinion is demeaning to the capabilities of the District Judge. Knowing that the law is not as the Government states it, Judge Motley's opinion obviously means that the conduct of the agents plays a significant role in interpreting the meaning of the "nod." Highly relevant to this determination is consideration of the fact that Rivera's "nod" was Agent O'Connor's own creation.[11] Not only was the "nod" not necessary

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[11] In making this evaluation, this Court must also be aware of the Supreme Court's caution, in Beck v. Ohio, supra, 379 U.S. at 97:

> An arrest without a warrant bypasses the safeguards provided by an objective predetermination of probable cause, and substitutes instead the far less reliable procedure of an after-the-event justification for the arrest or search, too likely to be subtly influenced by the familiar shortcomings of hindsight judgment.

to the transaction, that conduct was not even part of the transaction until O'Connor himself instigated it, and the transaction would have occurred exactly as it did whether or not Rivera actually participated by counting the money. The significance of this is that the record is therefore devoid of any confirmation that the "nod" was indicative of participation.

The "nod" alone will not suffice to establish probable cause -- it is too ambiguous a movement to establish participation. While a nod, of course, can communicate agreement, it can just as well communicate merely an acknowledgment of understanding or of a command. WEBSTER'S NEW TWENTIETH CENTURY DICTIONARY (2d ed.) at 1216. In United States v. Tramunti, 513 F.2d 1087, 1110 (2d Cir. 1975), this Court acknowledged the ambiguous nature of a nod. In that case, Tramunti had nodded in response to Inglese's statement, "I expect some goods. I am going to need some money." Of this evidence, this Court said, "there is still no direct tie of Tramunti to Inglese's business or to furtherance of its objectives." Id., 513 F.2d at 1111, emphasis added.

Moreover, as Judge Motley correctly found, the "nod" here was O'Connor's own creation, and as such it was particularly suspect. Rivera was faced with the dilemma, imposed upon him by O'Connor, of either actively repudiating what his friend, Glenn, was about to do, or passively allowing the deal to occur with the appearance of his participation.

Here, a decision to follow the path of least resistance is not tantamount to actual participation.

Wong Sun v. United States, 371 U.S. 471, 484 (1963), is controlling on this issue. There, the question was whether the defendant's flight when the agents approached created the probable cause otherwise lacking. The Supreme Court made clear, in language directly appropriate here, that "ambiguous conduct which the arresting officers themselves have promoted" will not transform suspicion into probable cause.

Judge Motley was correct when she found that the arrest of Rivera was made without probable cause and was therefore illegal.

B. The statement was the fruit of the primary illegality, and was properly suppressed.

Having found that there was no probable cause to arrest Rivera, Judge Motley was correct in suppressing his statement to the Assistant U.S. Attorney as a product of that illegal arrest. Brown v. Illinois, 422 U.S. 590 (1975); Wong Sun v. United States, supra. The statement in the instant case was obtained by "exploitation of that primary illegality," just as the statement in Brown v. Illinois, supra, 422 U.S. at 605, and the contraband in Wong Sun v. United States, supra, 371 U.S. at 487, had been.

Arresting Rivera at 11:40 p.m. enabled interrogation

after overnight incarceration and during the more than 16-hour delay between arrest and arraignment. Critically, it enabled the interrogation of Rivera at a time when he was extremely fatigued, having been denied sleep for virtually the entire preceding night. Moreover, it enabled the interrogation to proceed after having once, eleven hours earlier, effectively denied Rivera's request for a lawyer.

The Government's reliance on the fact that Miranda warnings were recited is misplaced. In Brown v. Illinois, supra, 422 U.S. at 603, the Supreme Court found that the fact that Miranda warnings are given will not convert the statement given into an act of free will so as to avoid the onus of taint. That is particularly true in a case like the one at bar, where the first set of warnings given was inadequate to apprise Rivera that he had the right to counsel during any interrogation even if he were indigent. See United States v. Olivares-Vega, 495 F.2d 827, 828 (2d Cir. 1974).

Incredibly, the Government seeks reversal in this Court on the theory that the delay in arraignment, and therefore the thirteen hours separating the arrest and the interrogation, coupled with intervening events, function somehow to purge the taint of the illegal arrest (Government Brief at 14-15). A recital of the "intervening events," many of which are conveniently ignored by the Government in its brief, reveals the absurdity of this argument. These events, in the order in which they occurred, follow seriatim:

(1) After arrest, Rivera was subjected to the unnecessary indignity of a strip search, a procedure this Court recently criticized in United States v. Duvall, Docket No. 75-1225, slip opinion 2123, 2126 (2d Cir., February 26, 1976) (Friendly, J.).

(2) As the processing continued, Rivera was the subject of verbal abuse and intimidation by a Federal agent who believed that homosexuality is a proper object for ridicule.

(3) Rivera's request to see a lawyer was not granted.

(4) For more than two hours he was transported back and forth between the Federal detention facility at West Street and The Tombs.

(5) He was kept the rest of the night in a cell at West Street without a bed, and was therefore deprived of sleep.

(6) Despite his earlier request to see a lawyer, Rivera was counseled the following morning by DEA Agent Bell that it would be better for him to cooperate now, before arraignment.

(7) Rivera was exposed to an unnecessary delay in his arraignment so as to enable the Assistant U.S. Attorney to obtain his statement (see United States v. Duvall, supra).

The causal chain between the illegal arrest and Rivera's statement surely cannot be broken by such illegal custody. Brown v. Illinois, supra, 422 U.S. at 597.

Disingenuous at best is the Government's suggestion (Government Brief at 15-16) that Rivera's statement was the product of free will because even if he had not been arrested,

he nonetheless would have given the same statement when questioned before the Grand Jury. The speculation that Rivera, advised by counsel, would provide the Government with the only evidence it had against h[illegible][11] does not merit response.

Judge Motley's suppression of the statement as a fruit of the illegal arrest was correct and should be sustained.

CONCLUSION

For the foregoing reasons, the order of the District Court should be affirmed.

Respectfully submitted,

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[11] The Government concedes that Glenn did not confess until after Rivera made his statement.

CERTIFICATE OF SERVICE

April 5, 1976

I certify that a corrected copy of this brief [redacted] has been mailed to the United States Attorney for the Southern District of New York.

Jonathan J. Silbermann